Filed 7/2/19 In re W.H. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re W.H., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.D., Defendant and Appellant.	E070869 (Super.Ct.No. J275784) OPINION

APPEAL from the Superior Court of San Bernardino County. Erin K. Alexander, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant D.D. (father) is the biological, but not the presumed, father of W.H. (the child). He appeals from a dispositional order of the juvenile court denying him family reunification services pursuant to subdivision (a) of section 361.5 of the Welfare and Institutions Code.[1] We will affirm.

BACKGROUND

When the dependency proceedings resulting in this appeal were initiated in 2018, mother had sole legal and physical custody of the child as a result of a juvenile dependency exit order issued in 2015. That dependency action had been initiated by San Bernardino County Children and Family Services (CFS) in 2014 when the child, then five years old, and his older maternal half sister were taken into protective custody after mother was arrested on drug-related charges. At that time, the juvenile court found the child would benefit from offering family reunification services to father.

A year later, father's services were terminated because he did not participate in some services or make sufficient progress as to others. The child was returned to mother, father was granted a minimum of monthly one-hour supervised visits, and the dependency was dismissed.

In April 2018, CFS again took the child (by then nine years old) and his half sister into protective custody after the mother was arrested for being under the influence of

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

methamphetamine. CFS placed the children with a relative and filed a section 300 juvenile dependency petition as to each of them.

At the detention hearing, the juvenile court ordered the parents to drug test and directed CFS to provide services to the family pending the hearing on disposition. Father was permitted two-hour supervised visits with the child at least once a week.

A few weeks later, in the course of setting the hearings on jurisdiction and disposition for contest, the court informed father of CFS's recommendation that he not be provided family reunification services. It advised him that it was inclined to order services if he established his intention to participate by engaging in services as quickly as possible.

By the July 2018 contested hearings, father had not participated in services. The juvenile court sustained an amended version of the petition, finding that the child came within section 300, subdivisions (b)(1) (failure to protect) and (j) (abuse of a sibling). The sustained allegations included father's substance abuse history, his failure to reunify with the child in the prior dependency proceeding, and his inability to care for the child because he knew, or should have known, that mother was unable to provide care due to her ongoing substance abuse problem.

The court adjudged the child a dependent of the court and removed him from parental care. Reunification services were ordered for the mother. As to father, the court found him to be a mere biological father and determined it was not in the child's best interest to offer him services. It noted father's previous failure to reunify, his lack of a

significant relationship with the child, his expressed lack of desire to engage in services, and his failure to engage in any of the services offered by CFS during the nearly three-month period elapsing between the child's detention and the dispositional hearing.

The court indicated that, because services were being offered to the mother, it would entertain a motion seeking services if father demonstrated commitment to follow through with them and to be a steady presence in the child's life. Father appealed.

DISCUSSION

Father argues that the juvenile court abused its discretion when it refused to order family reunification services for him. Before addressing his claim, we dispose of CFS's contention that father's appeal should be dismissed because father does not have standing and because the disentitlement doctrine applies.

Standing

CFS posits that a biological father lacks standing to raise on appeal any issue other than a denial of a request to elevate his status to presumed father. We are not persuaded.

Standing to appeal is construed liberally, with doubts to be resolved in its favor. (*In re K.C.* (2011) 52 Cal.4th 231, 236.) If a person's rights or interests are injuriously affected by the juvenile court's decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision, then that person has standing. (*Ibid.*)

Here, the juvenile court exercised its discretion to deny services to father. That denial injuriously affected father's interests in an immediate and substantial way. Had the court ordered family reunification services for father, CFS would be required to

fashion a plan designed to remedy or significantly ameliorate the conditions attributable to father that led to assertion of juvenile court jurisdiction. (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1228-1229 (*Nolan W.*).) Successful participation in a court-ordered plan would afford father the opportunity to demonstrate not only sufficient commitment to his parental responsibilities to achieve presumed father status but, upon achieving that status, also the opportunity to establish that he completed the programs deemed necessary by CFS to provide a safe home for the child. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451, 453.) Accordingly, we find father has standing to challenge the juvenile court's denial of family reunification services.

Disentitlement Doctrine

CFS also contends that father's lack of compliance with the juvenile court's order to drug test and failure to engage in predisposition services provide fit occasion to invoke the disentitlement doctrine and dismiss father's appeal. We disagree.

The disentitlement doctrine is a remedial tool that gives a reviewing court inherent power to dismiss an appeal if the appellant has refused to comply with a valid court order. (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277; *In re A.K.* (2016) 246 Cal.App.4th 281, 285 (*A.K.*).) In dependency cases, however, the doctrine is applied only when the appellant has engaged in egregious conduct that frustrates the purpose of dependency law and makes it impossible to protect the child or to act in the child's best interest. (*Id.* at p. 286.)

For example, the doctrine has been invoked to dismiss appeals of parties who absconded with dependent minors during the course of dependency proceedings and in cases in which a parent's refusal to comply with a court order adversely affected not only the court's ability to perform its duties but also the rights of the dependent minor. (E.g., *In re E.M.* (2012) 204 Cal.App.4th 467, 476, 478-479 [parent absconded with children, making them unavailable for court supervision]; *In re C.C.* (2003) 111 Cal.App.4th 76, 84-86 [mentally ill parent who refused to submit to examination to determine capability to reunify is not entitled to reunification services because her refusal interfered with the juvenile court's obligation to determine whether to order services or proceed to selection of a permanent plan, and interfered with the minor's legal right to have those issues decided].

The doctrine has also been applied when an appealing parent's course of flagrant disobedience and contempt impeded the progress of the dependency proceedings. In *A.K.*, a father appealed from the juvenile court's removal of his child upon a finding that his substance abuse prevented him from providing care. (*A.K.*, *supra*, 246 Cal.App.4th at p. 284.) We dismissed the appeal, finding that the father had exhibited an extraordinary and unmitigated pattern of obstruction, including not only his refusal to drug test but also his threats of physical harm against social workers, refusal to provide necessary information to the child services agency, failure to cooperate with his counsel, and his statement that he would not do anything the social worker told him to do. (*Id.* at pp. 286-287.)

In this case, father did not comply with the juvenile court's predisposition drug testing orders or engage in services. However, his conduct does not rise to the level of egregious behavior calling for application of the disentitlement doctrine. After all, it is not unusual for parents to fail to cooperate with the juvenile court and the child services agency, and it is well-settled that a parent unwilling to comply with court-ordered services may not be compelled to participate. (*Nolan W.*, *supra*, 45 Cal.4th at pp. 1233-1234.) Nor is there evidence that father's lack of participation in services and drug testing impeded the progress of the dependency proceedings or interfered with juvenile court's ability to protect the child or to act in the child's best interest.

We therefore decline to apply the disentitlement doctrine.

Denial of Family Reunification Services

Father argues that the juvenile court abused its discretion when it found the child's best interest would not be served by providing father family reunification services under subdivision (a) of section 361.5. We disagree.

Subdivision (a) of section 361.5 provides in relevant part that a biological father, unlike a statutorily presumed one, is not entitled to provision of family reunification services if his child is removed from parental custody. (§ 361.5, subd. (a).) The juvenile court may, however, order services for the biological father if it determines that the services would benefit the child. (*Ibid.*) Although the statute refers to "benefit," the parties and cases considering the issue of provision of services to a biological father correctly treat the term as analogous to a subdivision (c) finding that provision of

reunification services to an otherwise ineligible presumed parent would be in a child's "best interest." (§ 361.5, subd. (c); e.g., *Jennifer S. v. Superior Court* (2017) 15 Cal.App.5th 1113, 1124-1125.)

When faced with the question whether ordering services would be in a child's best interest, courts consider various factors. (*In re Z.G.* (2016) 5 Cal.App.5th 705, 722.) They include the parent's history, current efforts, bond with the minor, and the minor's need for stability and continuity. (*Ibid.*) It will not order services in the absence of some reasonable basis to conclude that reunification is possible. (*Ibid.*)

When a discretionary power is vested in the juvenile court by statute, its exercise of that discretion may not be disturbed on appeal except on a showing that the court exercised it in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.) We do not find an abuse of discretion here.

In this case, there was no reasonable basis for the juvenile court to believe that father would successfully reunify with the child if given the opportunity. At the April 2018 detention hearing, it ordered drug tests and predisposition services to be provided to father. In May, it advised father of its inclination to order family reunification services for him at the dispositional hearing if he got involved in the predisposition services right away "to show good faith that [he] would participate in them." After multiple attempts to contact him, the CFS services coordinator spoke to father in late June. He said that he

did not want to participate in the offered programs but would instead enroll in an inpatient facility.

By the time of the July hearing on disposition, nearly three months had elapsed without father engaging in any of the programs offered by CFS or enrolling in a program on his own. He had failed to show up for two drug tests. The results from a third test were still pending.

In addition to his previous failure to reunify and his lack of participation in predisposition services, father had not demonstrated commitment to developing and maintaining an ongoing significant relationship with the child. When the prior dependency was initiated in 2014, father said he was active in this child's life. During the first six months of family reunification services, however, he visited only four times even though he was permitted weekly visits. During the second six-month period, he did not visit at all. When that dependency was dismissed, the family law exit order provided for monthly visits with the child, but father visited at most every two months.

In this case, weekly two-hour supervised visits were ordered at the April 20, 2018 detention hearing but, due to scheduling problems, they did not begin until sometime after May 7. To his credit, father had been consistently attending and CFS reported that no concerns were noted. Recent regular visits, however, do not in and of themselves signal the existence of a significant relationship between a child and a father with a nine-year sporadic contact history.

Father claims services should have been offered to him not only because he met the criteria for presumed father status, but also because there was no other father in the picture and providing services to him would be consistent with the Legislature's goal of family preservation, particularly if the mother is unable to reunify. His arguments are unavailing.

We need not address the question whether father met the criteria of presumed fatherhood because he did not seek presumed status in the juvenile court. (*In re Jose C.* (2010) 188 Cal.App.4th 147, 161.) And, even if he had, the claim would fail as a matter of law. Contrary to his assertion, it is *actual* receipt of a child into the home, not simply *willingness* to do so, that will confer presumed father status if the parent also establishes that he openly held the child out as his natural child. (Fam. Code § 7611, subd. (d); *In re Cheyenne B.* (2012) 203 Cal.App.4th 1361, 1379.) Father does not claim, and the record does not reflect, that he ever took the child into his home.

Father suggests that a biological parent should be provided family reunification services when there is no other person in the picture to fill that role, and because it is uncertain whether the mother will be able to reunify. While those circumstances may properly be considered by the juvenile court when deciding whether a child will benefit from offering services to a biological father, they do not compel a decision that reunification efforts will be in a child's best interest.

It is true, as father posits, that the aim of dependency proceedings is to preserve and reunify families whenever possible. But, as reflected in subdivision (a) of section

361.5, a relationship sufficient to qualify as a presumed father is necessary to be entitled to the opportunity to achieve those goals.

In view of father's failure to demonstrate consistent commitment to being fully engaged with the child, his failure to reunify with the child in the 2014-2015 dependency even though he was offered or provided 12 months of services, and his refusal to participate in predisposition services offered in this case, the juvenile court did not abuse its discretion when it declined to offer family reunification services at the dispositional hearing.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RAPHAEL
J.

MENETREZ
J.